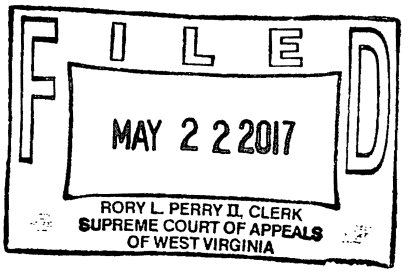
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 16-1151



ERIE INSURANCE COMPANY,
Defendant-Below, Petitioner

v.

RICKY A. DOLLY,
Plaintiff-Below, Respondent

Honorable Charles E. Parsons, Judge
Circuit Court of Hampshire County
Civil Action No. 14-C-62

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT

A. THE CIRCUIT COURT ERRED BY RULING THAT THE EXCLUSION OF UNINSURED MOTORIST COVERAGE FOR A TRAILER AND AN ATV VIOLATED THE MOTOR VEHICLE SAFETY RESPONSIBILITY LAW 2

B. THE CIRCUIT COURT ERRED BY DENYING ERIE'S MOTION TO DISMISS STATUTORY AND COMMON LAW BAD FAITH CLAIMS THAT ARE CLEARLY BARRED BY THE APPLICABLE ONE-YEAR STATUTE OF LIMITATIONS 9

1. Under *Wilt* and *Noland*, Statutory Bad Faith Claims Must Be Filed Within One Year of the Denial of an Insurance Claim and the Circuit Court Erred by Refusing to Dismiss the Statutory Bad Claim in this Case Filed More Than One-Year After Written Denial of the Claim 10

2. This Court's Recent Decision in *Beane* Conflicts with the Previous Decisions of this Court Regarding When a Common Law Bad Faith Cause of Action Accrues and the Decisions of Federal Courts Applying a One-Year Statute of Limitations to Common Law Bad Faith Claims 15

IV. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Ashraf v. State Auto Property and Casualty Co.,
2017 WL 1549582 (W. Va.) 8

Bell v. State Farm Mut. Auto. Ins. Co.,
157 W. Va. 623, 207 S.E.2d 147 (1974) 7

Blake v. State Farm Mut. Auto. Ins. Co.,
224 W. Va. 317, 685 S.E.2d 895 (2009) 6-7

Bluefield Gas Co. v. Abbs Valley Pipeline, LLC,
2012 WL 40460 (4th Cir.) 10

Boniey v. Kuchinski,
223 W. Va. 486, 677 S.E.2d 922 (2009) 4, 6-7

Davis v. Robertson,
175 W. Va. 364, 332 S.E.2d 819 (1985) 14

Deel v. Sweeney,
181 W. Va. 460, 383 S.E.2d 92 (1989) 7

Elliott v. AAA Ins.,
2016 WL 2766651 (N.D. W. Va.) 11-12

Forshey v. Jackson,
222 W. Va. 743, 671 S.E.2d 748 (2008) 9

Ghafourifar v. Community Trust Bank, Inc.,
2014 WL 4809794 (S.D. W. Va.) 13

Hayseeds, Inc. v. State Farm Fire & Casualty,
177 W. Va. 323, 352 S.E.2d 73 (1986) 15-16, 19

Humble Oil & Ref. Co. v. Lane,
152 W .Va. 578, 165 S.E.2d 379 (1969) 9

Imgrund v. Yarborough,
199 W. Va. 187, 483 S.E.2d 533 (1997) 7-8

In re T.O.,
2017 WL 562828 (W. Va.) 16

Johnson v. Nedeff,
192 W. Va. 260, 452 S.E.2d 63 (1994) 9

Kiger v. Cincinnati Ins. Co.,
110 F.3d 30 (4th Cir. 1997) 15

Kimble v. Erie Ins. Prop. & Cas. Co.,
No. 13-C-22 (Oct. 28, 2013) 13

Knapp v. American General Finance Inc.,
111 F.Supp.2d 758 (S.D. W. Va. 2000) 10-11

Noland v. Virginia Insurance Reciprocal,
224 W. Va. 372, 686 S.E.2d 23 (2009) 10, 17

Parsons v. Standard Ins. Co. and Minn. Life Ins. Co.,
185 F.Supp.3d 909 (N.D. W. Va. 2016) 12

Perdue v. Hess,
199 W. Va. 299, 484 S.E.2d 182 (1997) 10

State ex rel. Erie Ins. Prop. and Cas. Co. v. Beane,
2016 WL 3392560 (W. Va.) 15-16, 17-19

State ex rel. State Farm Fire & Cas. Co. v. Madden,
192 W. Va. 155, 451 S.E.2d 721 (1994) 14

State v. McKinley,
234 W. Va. 143, 764 S.E.2d 303 (2014) 16

State v. W.,
234 W. Va. 143, 764 S.E.2d 303 (2014) 16

Watson v. National Union Fire Insurance Co.,
2013 WL 2000267 (S.D. W. Va.) 12-13

Wilt v. State Auto. Mut. Ins. Co.,
203 W. Va. 165, 506 S.E.2d 608 (1998) 10, 17-19

CONSTITUTIONS

W. Va. Const., art. VIII, § 4 16

STATUTES

W. Va. Code § 17D-2A-2 2

W. Va. Code § 17D-2A-4 3

W. Va. Code § 17D-4-2(a) 2, 4

W. Va. Code § 17D-4-12(a) 3

W. Va. Code § 17D-4-12(f)(4) 3

W. Va. Code § 33-6-31(b) 3

I. STATEMENT OF THE CASE

Petitioner, Erie Insurance Company ["Erie"], does not disagree with the statement of facts by Respondent, Ricky A. Dolly ["Mr. Dolly"], with three exceptions.

First, Mr. Dolly implicitly complains that Erie did not step in and defend the other driver, Emily Cole ["Ms. Cole"],[1] but as Mr. Dolly acknowledges, he was seeking no damages for personal injury, but only property damage, and Erie fully paid for damages to Mr. Dolly's truck under the UM provisions of Mr. Dolly's policy with Erie. Accordingly, there was nothing to defend and the judgment entered in the amount of $19,420.72 was solely for property damages.[2]

Second, although not explicitly referenced in his statement of facts, the Circuit Court agreed on November 11, 2016, that there was no coverage for damage to Mr. Dolly's trailer and ATV, but held that Mr. Dolly could nevertheless recover for property damage to his trailer up to the mandatory minimum limits of the motor vehicle responsibility statute.[3] So, the issue presented in this appeal is not whether Mr. Dolly's trailer and ATV were covered under his Erie policy, but rather whether the Circuit Court erred in amending Erie's policy to provide coverage in the amount of the mandatory statutory minimum limits.[4]

Finally, although Mr. Dolly appears to dispute "Erie's contention that Erie paid for Mr. Dolly's truck under the provisions of his underinsured motorist coverage,"[5] Erie's records which

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[1] [Respondent's Brief at 3]

[2] [APP 57]

[3] [APP 583]

[4] Mr. Dolly does not cross-appeal the Circuit Court's ruling that there was no coverage under his Erie policy for the trailer and ATV. Accordingly, that ruling is final and conclusive for purposes of this appeal.

[5] [Respondent's Brief at 4]

have been provided to Mr. Dolly indisputably demonstrate that payment for the damages to Mr. Dolly's truck came from the UM portion of his policy[6] and, more importantly, in his own motion to amend his complaint, Mr. Dolly acknowledged that, "On March 30, 2015, Erie notified Mr. Dolly's counsel that uninsured motorist coverage existed for the truck . . . ."[7]

II. SUMMARY OF ARGUMENT

Erie submits that the Circuit Court erred in denying its motion to dismiss Mr. Dolly's bad faith claims which filed well beyond one-year after it denied his UM claims and in denying its motion for summary judgment under policy language approved by the Insurance Commissioner.

III. ARGUMENT

A. THE CIRCUIT COURT ERRED BY RULING THAT THE EXCLUSION OF UNINSURED MOTORIST COVERAGE FOR A TRAILER AND AN ATV VIOLATED THE MOTOR VEHICLE SAFETY RESPONSIBILITY LAW.

The Motor Vehicle Safety Responsibility Law only "applies to the operation of all motor vehicles required to be registered or operated on the roads and highways to have the security in effect, as provided in section three, article two-a of this chapter." W. Va. Code § 17D-2A-2.

W. Va. Code § 17D-4-2(a) defines "proof of financial responsibility" as "proof of ability to respond in damages for liability, on account of accident occurring subsequent to the effective date of the proof, arising out of the ownership, operation, maintenance or use of a motor vehicle, trailer or semitrailer . . . in the amount of $10,000 because of injury to or destruction of property of others in any one accident."

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[6] Pending is a motion by Erie to supplement the record with records showing that it paid Mr. Dolly's claim for damage to his truck from the uninsured coverage under his policy.

[7] [APP 59]

One method of proof if financial responsibility is a "certificate of insurance" under W. Va. Code § 17D-2A-4 for "motor vehicle policy" as defined under W. Va. Code § 17D-4-12(a), which defines such term as "an 'owner's policy' or an "operator's policy' of liability insurance certified as provided in section ten or section eleven of this article as proof of financial responsibility, and issued, except as otherwise provided in section eleven."

The law makes clear that any policy provision that does not directly conflict with the statute is valid and enforceable: "Every motor vehicle liability policy is subject to the following provisions which need not be contained therein . . . The policy, the written application therefor, if any, and any rider or endorsement which does not conflict with the provisions of this chapter constitutes the entire contract between parties." W. Va. Code § 17D-4-12(f)(4).

So, the Circuit Court was correct that if Ms. Cole had complied with the law, she was operating a motor vehicle required to be licensed, and the vehicle she was operating should have had a motor vehicle liability policy with minimum coverage of $10,000 for property damage for which she was liable as a result of a motor vehicle accident in which she was at fault. Because there was no available motor vehicle policy, Mr. Dolly was then permitted to make a claim for property damage under his own uninsured motorist coverage.

W. Va. Code § 33-6-31(b) provides as follows:

> Nor may any such [motor vehicle] policy or contract be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he or she is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code, as amended from time to time . . . .

So, reasoned the Circuit Court, if W. Va. Code § 33-6-31(b) requires that every motor vehicle policy have an uninsured motorist provision with limits no less than "the amount of

$10,000 because of injury to or destruction of property of others in any one accident" found in W. Va. Code § 17D-4-2(a), Erie's policy violated the uninsured motorist statute because it excluded trailers and ATVs from coverage.

Respectfully, the question is not the one posed by the Circuit Court, i.e., whether Ms. Cole's policy would have provided at least $10,000 in property damage coverage. Rather, the question is if Ms. Cole had been operating a trailer or ATV without a "motor vehicle liability policy," whether she would have been violating the Motor Vehicle Safety Responsibility Law?

Again, the exclusion at issue, approved by the Insurance Commissioner, provides:

> Uninsured/Underinsured Motorists Coverage is not provided for any "**trailer**," whether or not the "**trailer**" is attached to another "**motor vehicle**" or "**miscellaneous vehicle.**" No separate limit of protection for Uninsured/Underinsured Motorists Coverage is available for a "**trailer,**" whether attached or unattached to a "**motor vehicle**" or "**miscellaneous vehicle.**" Uninsured/Underinsured Motorists Coverage does not apply to a "**miscellaneous vehicle**" owned or leased by "**you**" or a "**relative**" unless the "**miscellaneous vehicle**" is listed on the "**Declarations**" and a premium is shown for this coverage.[8]

In other words, Erie's policy provided coverage only for motor vehicles, and not trailers or ATVs, which are not subject to the motor vehicle safety responsibility statute.

As this Court observed in *Boniey v. Kuchinski*, 223 W. Va. 486, 491-492, 677 S.E.2d 922, 927-928 (2009)[9]:

> Significantly, the Legislature has not required all motor vehicles to maintain security in the form of an insurance policy within the limits of W. Va. Code § 17D-4-2. Instead, the Legislature has expressly indicated that the security requirement applies to "[e]very owner or registrant of a motor vehicle **required to**

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[8] [APP 401]

[9] In *Boniey*, the insured was riding an ATV owned by another person which was not insured at the time of the accident. The insured's carrier, State Farm, denied coverage as its policy, like Erie's, excluded uninsured motorist coverage for ATVs.

be registered and licensed in this state." W. Va. Code § 17D-2A-3(a) (emphasis added). See also W. Va. Code § 17D-2A-2 (1982) (applying proof of security in article 2A to "the operation of all motor vehicles **required to be registered**" (emphasis added)); W. Va. Code 17D-2A-1 (purpose of article 2A "is to promote the public welfare by requiring every owner or registrant of a motor vehicle **licensed** in this State to maintain certain security **during the registration period for such vehicle**" (emphasis added)). Therefore, a motor vehicle that is not required to be registered and licensed pursuant to W. Va. Code §§ 17A-3-1, et seq. is excepted from the mandatory security provisions in the Motor Vehicle Safety Responsibility Law including motor vehicle liability insurance coverage mandated by W. Va. Code § 17D-4-2.

In order to determine whether a motor vehicle is required to be registered and licensed, we look to W.Va. Code § 17A-3-2(a) (2004). This code section provides that "[e]very motor vehicle, trailer, semitrailer, pole trailer and recreational vehicle when driven or moved upon a highway is subject to the registration and certificate of title provisions of this chapter." There are, however, several exceptions to this rule. The exception applicable to the instant case is found in W. Va. Code § 17A-3-2(a)(6), which provides that "[t]he following recreational vehicles are exempt from the requirements of annual registration, license plates and fees, unless otherwise specified by law, but are subject to the certificate of title provisions of this chapter regardless of highway use: Motorboats, **all-terrain vehicles** and snowmobiles [.]" (Emphasis added). Pursuant to this code section, ATVs are expressly excepted from the requirements of annual registration and licensing under W. Va. Code § 17A-3-1 et seq. We conclude, therefore, that because ATVs are not required to be registered and licensed in this State, such vehicles also are not required to have motorist liability insurance coverage pursuant to the financial responsibility law at W.Va. Code § 17D-4-2.

As noted above, uninsured motorist coverage is intended to provide the equivalent of motor vehicle liability coverage under our financial responsibility law. In other words, uninsured motorist coverage is intended to place a motorist who is injured by the negligence of an uninsured motorist in the position he or she would have been in if the negligent motorist had complied with the financial responsibility law and procured the required amount of liability insurance. **Where no liability insurance coverage is required on a motor vehicle under the financial responsibility law, obviously no uninsured motorist coverage is mandated to provide the equivalent of such coverage**. Consequently it would not further the purpose of the uninsured motorist statute to construe the statute to require uninsured motorist insurance to cover those motor vehicles which are not required by the financial responsibility law to have liability insurance coverage. Therefore, we find that a vehicle which is not required to have liability insurance coverage in the amounts specified by W. Va. Code § 17D-4-2 is not an "uninsured motor vehicle" within the meaning of W. Va. Code § 33-6-31(b).

> This finding is consistent with the definition of "uninsured motor vehicle" in W. Va. Code § 33-6-31(c) which provides in relevant part that "the term 'uninsured motor vehicle' shall mean a motor vehicle as to which there is no . . . Bodily injury liability insurance and property damage liability insurance both **in the amounts specified by** [W. Va. Code § 17D-4-2]." (Emphasis added).
>
> Based on the above, this Court determines that because an ATV is not required to have liability insurance coverage under the financial liability law, an ATV is not an "uninsured motor vehicle" for the purposes of W. Va. Code § 33-6-31(b). Accordingly, we conclude that an insurance policy provision excluding ATVs from the uninsured motorist coverage mandated by W. Va. Code § 33-6-31(b) does not violate the intent and purpose of the uninsured motorist statute.[10]

This Court's decision in *Boniey* is consistent with *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W. Va. 317, 685 S.E.2d 895 (2009), where the policyholder borrowed a trailer from his neighbor which was subsequently destroyed in a single vehicle accident in which the policyholder was at fault. The subject policy in *Blake* excluded property damage coverage for "ANY DAMGES TO PROPERTY . . . IN THE CHARGE OF OR TRANSPORTED BY AN INSURED" which would have included the borrowed trailer. Rejecting the policyholder's argument that such exclusion violated the statute, this Court stated:

> It is important that one of the purposes of the Motor Vehicle Safety Responsibility Law, West Virginia Code §§ 17D-1-1 to -6-7 (2009), is "'to provide a minimum level of financial security to third-parties who might suffer bodily injury or property damage from negligent drivers.'" *Dairyland Ins. Co. v. East*, 188 W. Va. 581, 585, 425 S.E.2d 257, 261 (1992)(quoting *Jones v. Motorists Mut. Ins. Co.*, 177 W. Va. 763, 766, 356 S.E.2d 634, 637 (1987)). As the Court of Appeals of Idaho concluded in *McMinn v. Peterson*, 116 Idaho 541, 777 P.2d 1214 (Id. Ct. App. 1989), in analyzing language in the Idaho Code similar to that found here, "[t]he 'in charge of,' . . . exclusion of automobile liability insurance, does not contravene any public policy of protecting innocent victims of negligent and financially irresponsible motorists so as to render such exclusion invalid." Id. at 1217. Unquestionably, liability coverage would have been applicable in this case had the trailer that was attached to Mr. Blake's vehicle caused personal injury or property damage to another while affixed to Mr. Blake's vehicle. This event, however, did not occur. The loss that occurred in this case was not only outside the coverage

[10] [Footnotes omitted]

> provided by the State Farm policy, as the insured only purchased liability coverage and not comprehensive or collision coverage, but it is also outside the coverage that is mandated by the provisions of West Virginia Code § 17D-4-12(e).[11]

The three cases cited by Mr. Dolly[12] are inapposite to the circumstances of this case.

First, this Court's decision in *Bell v. State Farm Mut. Auto. Ins. Co.*, 157 W. Va. 623, 207 S.E.2d 147 (1974), was overruled in Syllabus Point 4 of *Imgrund v. Yarborough*, 199 W. Va. 187, 483 S.E.2d 533 (1997), where this Court held:

> An "owned but not insured" exclusion to uninsured motorist coverage is valid and enforceable above the mandatory limits of uninsured motorist coverage required by W. Va. Code §§ 17D-4-2 (1979) (Repl. Vol. 1996) and 33-6-31(b) (1988) (Supp. 1991). To the extent that an "owned but not insured" exclusion attempts to preclude recovery of statutorily mandated minimum limits of uninsured motorist coverage, such exclusion is void and ineffective consistent with this Court's prior holding in Syllabus Point 2 of *Bell v. State Farm Mutual Automobile Insurance Company*, 157 W. Va. 623, 207 S.E.2d 147 (1974).

Moreover, the insured in *Bell* was operating a motorcycle, which is a motor vehicle for which a license is required to operate on the roads and highways, not an ATV as was at issue in this Court's later case of *Boniey* or a trailer as was at issue in this Court's later case of *Blake*.

Second, this Court's decision in *Deel v. Sweeney*, 181 W. Va. 460, 383 S.E.2d 92 (1989), involved discretionary underinsured motorist coverage, not mandatory uninsured motorist coverage, which is why this Court affirmed a lower court ruling that a father's underinsured motorist policy did not provide coverage for his son who was driving the son's personally owned vehicle insured by another company. Moreover, the insured in *Deel* was operating a motor vehicle, not an ATV or trailer.

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[11] *Blake*, supra at 322, 685 S.E.2d at 900.

[12] [Respondent's Brief at 8-10]

Finally, *Imgrund*, supra, this Court held that a motorcyclist who had recovered the minimum mandatory uninsured motorist coverage under his own policy was not entitled to recover additional benefits under his parents' policy in light of an "owned but not insured" exclusion in the parents' policy, which is why it overruled *Bell*. Here, Erie has never disputed that Mr. Dolly had uninsured motorist coverage and, indeed, paid him for damage to his truck as a result of a covered uninsured motorist accident. Rather, Erie has only disputed that it is liable to reimburse Mr. Dolly for damage to his ATV and trailer under *Boniey*, *Bailey*, and the policy language which has been approved by the West Virginia Insurance Commissioner.

Mr. Dolly's argument in this case is somewhat similar to the argument of Dr. Ashraf recently rejected by this Court in *Ashraf v. State Auto Property and Casualty Co.*, 2017 WL 1549582 (W. Va.), where it held in Syllabus Point 1:

> A vacancy provision in a fire insurance policy which provides that the insurer is allowed to reduce by 15% the stated amount of coverage payable for the total loss of a building destroyed by fire is enforceable, where the building has been vacant for more than 60 consecutive days prior to the loss. The provision does not conflict with this State's valued policy statute, W.Va. Code, 33-17-9 [2005], or this State's Standard Fire Policy adopted pursuant to W.Va. Code, 33-17-2 [1957].

As this Court further explained:

> [T]he vacancy reduction provision does not offend the valued policy statute or the statute's derivative West Virginia Changes endorsement included in the State Auto policy. The 15% reduction is an anticipatory limitation regarding the risk to a structure from extended vacancy. The reduction was clearly operable here where the building was vacant for almost six years prior to the October 29, 2012, fire.

Id. at *7.

Similarly, in the present case, the exclusion at issue, approved by the Insurance Commissioner, is an anticipatory limitation excluding "trailers" and "miscellaneous vehicles" from uninsured motorist coverage in a manner that does not offend the omnibus statute.

Accordingly, Erie respectfully submits that the Circuit Court erred by discounting the Insurance Commissioner's approval of the language in Erie's uninsured motorist endorsement which clearly excludes coverage for either a "trailer" or a "miscellaneous vehicle," which would include Mr. Dolly's trailer and ATV.

B. THE CIRCUIT COURT ERRED BY DENYING ERIE'S MOTION TO DISMISS STATUTORY AND COMMON LAW BAD FAITH CLAIMS THAT ARE CLEARLY BARRED BY THE APPLICABLE ONE-YEAR STATUTE OF LIMITATIONS.

On November 4, 2013, Mr. Dolly was provided the denial letter from Erie informing him that Erie declined to pay the property damage claims for his trailer and ATV.[13] Mr. Dolly did not, even though he had the assistance of counsel during the interim, file his amended complaint alleging UTPA violations and common law bad faith against Erie until March 22, 2016, well after the one-year limitations period expired. This Court has acknowledged its "history of strictly adhering to statutes of limitation and repose."[14] Moreover, "statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within

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[13] [APP 153] Importantly, this letter confirmed a telephone conversation with Mr. Dolly providing the same information: "This letter will confirm our conversation of October 30, 2013 . . . As I advised, there is no coverage under the Uninsured Motorist Property Damage Endorsement for the damages sustained to your trailer and ATV which occurred in this accident." Id.

[14] *Forshey v. Jackson*, 222 W. Va. 743, 758, 671 S.E.2d 748, 763 (2008) (Benjamin, J., concurring); see also *Johnson v. Nedeff*, 192 W. Va. 260, 263, 452 S.E.2d 63, 66 (1994) ("At one time the attitude of courts was hostile toward the enforcement of statute of limitations. However, legislative policy in enacting such statutes is now recognized as controlling and courts, fully acknowledging their effect, look with favor upon such statutes as a defense. . . 'Statutes of limitations are now considered as wise and beneficent in their purpose and tendency . . . and are held to be rules of property vital to the welfare of society.'"); *Humble Oil & Ref. Co. v. Lane*, 152 W .Va. 578, 582, 165 S.E.2d 379, 383 (1969) (dismissal cannot be avoided by rhetoric and argument but a plaintiff must "bring himself strictly within some exception.").

some exception."[15] Based upon these standards, Mr. Dolly's UTPA and common law bad faith allegations should have been dismissed.

1. Under *Wilt* and *Noland*, Statutory Bad Faith Claims Must Be Filed Within One Year of the Denial of an Insurance Claim and the Circuit Court Erred by Refusing to Dismiss the Statutory Bad Claim in this Case Filed More Than One-Year After Written Denial of the Claim.

West Virginia law is clear that claims brought under the UTPA have a one-year statute of limitations.[16] This Court used the reasoning in *Wilt* to hold that "[t]he one year statute of limitations . . . applies to a common law bad faith claim."[17]

West Virginia generally adheres to the "discovery rule" for determining when the statute of limitations begins to run. In other words, the statute of limitations begins to run when a plaintiff knew or should have known of the existence of a claim.

For example, in *Knapp v. American General Finance Inc.*, 111 F.Supp.2d 758 (S.D. W. Va. 2000), involving bad faith claims not arising from any alleged breach of the duty to defend, but from the sale of credit insurance in conjunction with a loan transaction, the court held:

> The statute of limitations for claims arising under the West Virginia Unfair Trade Practices Act (UTPA), West Virginia Code §§ 33-11-1 *et seq.*, is one year. *See Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 506 S.E.2d 608 (1998). Because the Knapps' loan agreement was entered into on November 26, 1997 and this action was not brought until May 21, 1999, Defendants argue their UTPA claim should be barred by the statute of limitations.

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[15] *Perdue v. Hess*, 199 W. Va. 299, 303, 484 S.E.2d 182, 186 (1997) (citation omitted)(neither equitable tolling nor excusable neglect toll limitation period); *Bluefield Gas Co. v. Abbs Valley Pipeline, LLC*, 2012 WL 40460, *7 (4th Cir.) ("Statutes of limitations are not mere technicalities. Rather, they 'have long been respected as fundamental to a well-ordered judicial system.'")

[16] *Wilt v. State Auto. Mut. Ins. Co.*, 203 W. Va. 165, 171, 506 S.E.2d 608, 614 (1998) ("[W]e determine that claims involving unfair settlement practices that arise under the Unfair Trade Practices Act are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c)").

[17] Syl. pt. 4, *Noland v. Virginia Insurance Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009).

> In a variety of cases, however, the Supreme Court of Appeals of West Virginia has applied the Discovery Rule, holding that "a right of action does not 'accrue' until the plaintiffs knew or should have known by the exercise of reasonable diligence of the nature of their claims." *Stemple v. Dobson,* 184 W. Va. 317, 320, 400 S.E.2d 561, 564 (1990).[18]

In the instant case, it is undisputed that Mr. Dolly knew or should have known of the existence of his UTPA and common law bad faith claims when Erie denied, in writing, the uninsured motorist property damage claims in question on November 4, 2013, informing him that there was no coverage under his uninsured motorist endorsement for damage to his trailer and ATV.

Other West Virginia circuit courts and federal district courts have dismissed actions alleging UTPA violations and common law bad faith for violation of the one-year limitation period, as exemplified by the *Elliott*, *Parsons*, *Watson*, and *Kimble* cases discussed below. Moreover, despite Mr. Dolly's arguments that the one-year statute of limitations only applies to the denial of a request to defend a policyholder from a third-party claim, courts have routinely applied the one-year statute to first-party claims.

In *Elliott v. AAA Ins.*, 2016 WL 2766651 (N.D. W. Va.), for example, Judge Stamp granted the insurance company's motion to dismiss bad faith claims filed outside the one-year limitation period. The insured, Elliott, sued the insurer for requiring release of extra-contractual claims during negotiations over a disputed underinsured motorist claim. Judge Stamp rejected the plaintiff's argument that the continuous tort doctrine applied to toll the limitation period finding that courts have found the doctrine to not apply "when a party received separate and continued refusals by his insurer to provide coverage under an insurance policy[.]"[19] Further, the

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[18] Id. at 765.

[19] *Elliott*, supra at *3.

limitations period began to run when the plaintiff-insured was informed of the global release upon receipt of the settlement agreement, but failed to file the Complaint for more than one year.[20] Judge Stamp applied *Noland* to hold that "'the alleged harm occurred when the insurer's position was made clear by the 1986 [coverage denial] letter and the insurer maintained that position by subsequently refusing to . . . indemnify. . . Therefore, the Court in *Adamski* found that the plaintiff could not 'now avoid . . . an applicable statute of limitations by asserting the continuing refusal to cover the insured was a separate act of bad faith.'"[21]

In *Parsons v. Standard Ins. Co. and Minn. Life Ins. Co.*, 185 F.Supp.3d 909 (N.D. W. Va. 2016), Judge Keeley granted the insurance company's motion to dismiss the UTPA and common law bad faith claims under a disability policy for being filed outside the one-year limitation period, finding that the limitations period accrued on the date of the denial of coverage letter from the insurer. Applying *Noland*, Judge Keeley held that the claims accrued when he received the insurer's coverage denial letter and the limitations period began to run on that date.[22] Also rejected was plaintiff-insured's argument that because the insurer's denial letter informed him of his right to seek review of the denial, he is entitled to equitable estoppel to prevent application of the limitations period.[23] Consequently, the plaintiff-insured's complaint, filed more than one year after the coverage denial letter was received, was dismissed.

In *Watson v. National Union Fire Insurance Co.*, 2013 WL 2000267 at *4 (S.D. W. Va.),

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[20] Id. at *5.

[21] Id.

[22] *Parsons*, supra at 915.

[23] Id.

Judge Berger granted an insurance company's motion to dismiss a policyholder's statutory and common law bad faith claims under an underinsurance motorist policy because the policyholder failed to file his claims within one year of the denial letter stating:

> The Court has considered the allegations set forth in Plaintiff's First Amended Complaint which clearly establishes the date of Plaintiff's accident, the date he sought the benefit of the Defendant NUFIC issued insurance policy and the date of the denial of benefits by Defendant Chartis on November 11, 2009. The West Virginia Supreme Court of Appeals has established that the statute of limitations for both a bad faith claim and for violations of the UTPA is one year. See *Wilt v. State Auto Mut. Ins. Co.*, 506 S.E .2d 608, 614 (W. Va. 1998) (establishing that the one-year statute of limitations set forth in W. Va. Code § 55-2-12(c) applies to claims involving unfair settlement practices under the UTPA); *Noland v. Virginia Ins. Reciprocal*, 686 S.E.2d 23 (W. Va. 2009) (holding that the one-year statute of limitations contained in W. Va. Code § 55-2-12(c) applies to common law bad faith claims.) As is obvious from the pleading, Plaintiff became aware of the denial of insurance benefits on November 11, 2009. He has not stated any reason in the amended pleading to prompt an inquiry regarding whether the statute of limitations should be tolled. Therefore, a timely claim was required to be filed by November 11, 2010. Plaintiff's initial complaint was filed in October, 2012. Therefore, taking Plaintiff's allegations as true, Plaintiff's alleged bad faith and UTPA claims are time-barred by the applicable one year statute of limitations. Thus, this Court finds that Counts 2 and 3 of the First Amended Complaint should be dismissed for Plaintiff's failure to state a claim upon which relief can be granted.[24]

Count III of Mr. Dolly's complaint alleges a violation of the UTPA.[25] It is solely

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[24] In *Kimble v. Erie Ins. Prop. & Cas. Co.*, No. 13-C-22 (Oct. 28, 2013), Judge Jordan granted the insurance company's motion to dismiss the UTPA and common law bad faith claims because the complaint was filed "over one year following the denial of the claim" by Erie Insurance Company's coverage denial letter to the plaintiff-insured. Judge Jordan applied *Wilt* and *Noland* to hold that the one-year limitation period was exceeded and required dismissal of the plaintiffs' first-party property damage claim. See also *Ghafourifar v. Community Trust Bank, Inc.*, 2014 WL 4809794 at *4 (S.D. W. Va.)("Moreover, in West Virginia there is a one year statute of limitations in which to bring a claim for bad faith. See *Noland v. Virginia Ins. Reciprocal*, 224 W.Va. 372, 686 S.E.2d 23, 33 (W.Va. 2009). In his complaint, Plaintiff states that he requested a loan modification in 2011. ECF No. 1. As the Magistrate Judge properly noted, Defendant modified the loan document, and Plaintiff was aware of the changes to the loan document, in December, 2011. ECF No. 1; ECF No. 7. Plaintiff did not institute this action until December, 2013. ECF No. 1. Thus, even if Plaintiff does have a valid claim for bad faith, he did not file his claim within the applicable limitations period and his claim is time barred.").

[25] [APP 90-92]

predicated upon Erie's processing of his claim, allegedly in violation of the UTPA, which cumulated in Erie's denial of his claim by letter dated November 4, 2013. Accordingly, Mr. Dolly's UTPA claim "accrued" for purposes of the UTPA on November 4, 2013, and he had until November 4, 2014, to file that claim under *Wilt*, but failed to do so.

In his brief, Mr. Dolly argues that "the statute of limitations did not start running until the lower court granted judgment against Emily Cole on November 2, 2015,"[26] but his own amended complaint states, "The only dispute concerns Erie's liability under the uninsured motorist provision of the Policy of insurance for the damages and losses Mr. Dolly has suffered to his ATV and Trailer at the hands of an insured motorist,"[27] and such dispute (1) was not contingent upon the outcome of Mr. Dolly's litigation against the uninsured motorist and (2) was joined when Erie denied UM coverage for the trailer and ATV by letter dated November 4, 2013.

Mr. Dolly's reliance in his brief[28] upon this Court's decision in *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1985), is misplaced as this Court overruled *Davis* in Syllabus Point 3 of *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994):

> To the extent *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981), *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1985), *Robinson v. Continental Cas. Co.*, 185 W. Va. 244, 406 S.E.2d 470 (1991), or *Russell v. Amerisure Ins. Co.*, 189 W. Va. 594, 433 S.E.2d 532 (1993) imply that an action against an insurer for bad-faith and unfair settlement practices cannot be joined in the same complaint as the underlying personal injury suit against the insured, they are overruled.

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[26] Respondent's Brief at 19.

[27] [APP 6]

[28] Respondent's Brief at 19-21.

Of course, Mr. Dolly's citation[29] of the Fourth Circuit's decision in *Kiger v. Cincinnati Ins. Co.*, 110 F.3d 30 at *2 (4th Cir. 1997), is equally flawed as it relied upon *Davis* which had been overruled in *Madden*:

> The district court properly relied on *Davis v. Robertson*, 332 S.E.2d 819, 826 (W. Va. 1985), to dismiss the direct action against Cincinnati. In *Davis* the West Virginia Supreme Court held that the West Virginia uninsured motorist coverage statute "does not authorize a direct action against the insurance company providing uninsured motorist coverage until a judgment has been obtained against the uninsured motorist." Id. The *Davis* court reasoned that the John Doe provisions of the statute, which allow the plaintiff to proceed against a fictional person, would be unnecessary if the insured could directly sue the insurer.

Plainly, Mr. Dolly's cause of action accrued when Erie wrote him on November 4, 2013, informing him that there was no coverage under his uninsured motorist endorsement for damage to his trailer and ATV, and under *Madden*, he could have instituted a direct action against Erie for declaratory relief and bad faith which did not depend on the outcome of his suit against the uninsured motorist. Because he did not file his suit against Erie until more than one year after the November 4, 2013, letter denying any coverage for his trailer or ATV, Mr. Dolly's statutory and common law bad faith claims are barred by the statute of limitations.

2. This Court's Recent Decision in *Beane* Conflicts with the Previous Decisions of this Court Regarding When a Common Law Bad Faith Cause of Action Accrues and the Decisions of Federal Courts Applying a One-Year Statute of Limitations to Common Law Bad Faith Claims

Recently, with respect to a property damage claim under a homeowners insurance policy and alleged common law bad faith for denial of insurance benefits under *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W. Va. 323, 352 S.E.2d 73 (1986), this Court determined in the unpublished memorandum decision *State ex rel. Erie Ins. Prop. and Cas. Co. v. Beane*, 2016 WL

[29] Id. at 21-22.

3392560 (W. Va.) (memorandum), that the one-year statute of limitations did not begin to run on the date the insureds became aware of the denial of their insurance claim. Rather, "the one-year statute of limitations in a *Hayseeds* common law bad faith action does not begin to run until the policy holder prevails in his or her property damage suit."[30]

First, the Court in *Beane* did not address the one-year statute of limitations as it applies to UTPA violation claims. *Wilt* clearly holds that it begins to run when an insurer refuses coverage. Accordingly, there is now a conflict between *Wilt* and *Beane* regarding when a claim "accrues" for purposes of a statutory versus a common law first-party bad faith claim.

Second, Erie submits that the decision in *Beane* does not take into account the realities of bad faith litigation, i.e., an insured typically does not sue over the denial of coverage and, then, once suit is over, files a second *Hayseeds* suit. The insured cannot have it both ways. Either the insured asserts the *Hayseeds* claim within one year of denial of insurance benefits in order to preserve it should he or she prevail in the coverage dispute or, if the accrual date is that point in time when all the elements of the cause of action have come into existence, then the insured must wait until after he or she prevails in the coverage dispute to assert the *Hayseeds* claim.

Third, although this Court has explained, "memorandum decisions are pronouncements on the merits that fully comply with the constitutional requirements"[31] and "may be cited as legal authority, and are legal precedent,"[32] it has also noted that they are supposed to involve "the

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[30] Id. at *4.

[31] *In re T.O.*, 2017 WL 562828 at * 8 (W. Va.); see also W. Va. Const., art. VIII, § 4, in part ("When a judgment or order of another court is reversed, modified or affirmed by the court, every point fairly arising upon the record shall be considered and decided; the reasons therefor shall be concisely stated in writing and preserved with the record[.]").

[32] Syl. pt. 5, in part, *State v. W.*, 234 W. Va. 143, 764 S.E.2d 303 (2014).

Court's application of settled law to the facts of a particular case."[33] Accordingly, this Court has cautioned that "where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.[34]"

In Syllabus Point 4 of *Noland*, supra, this Court held, "The one year statute of limitations contained in W. Va. Code § 55-2-12(c) (1959) (Repl. Vol. 2008) applies to a common law bad faith claim," and as previously discussed, every other court that had consider the issue prior to Beane had applied the same "notice of denial" standard set forth in Syllabus Point 5 of *Noland* to property damage claims. Accordingly, Erie submits that *Beane*, a memorandum decision, effectively overruled *Noland*, which should have been reserved for a signed opinion.

Finally, this Court has held "a common law bad faith claim sounds in tort"[35] and the "tort" in a common law bad faith claim obviously does not occur when the policyholder substantially prevails, as this Court erroneously held in *Beane*, but as every other court which has ever considered the issue has held, when the policyholder's claim is denied. As this Court held in *Wilt* with respect to statutory bad claims, which also sound in tort:

> The WVUTPA is considered a tort action for this purpose. See *Kenney v. Indep. Order of Foresters*, 744 F.3d 901, 907 (4th Cir. 2014). The discovery rule tolls the statute of limitations "until a claimant knows or by reasonable diligence should know of his claim." *Marple v. Allstate Ins. Co.*, No. 5:10CV3, 2010 WL 3788048, at *3 (N.D. W. Va. Sept. 23, 2010) (citing *Dunn*, 689 S.E.2d at 262 (quoting *Gaither*, 487 S.E.2d at 906)). A plaintiff who knows of facts that place him or her on notice of a possible duty of care breach "has an affirmative duty to further and fully investigate the facts surrounding that potential breach." *McCoy v. Miller*, 578 S.E.2d 355, 359 (W. Va. 2003).

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[33] *T.O.*, supra at *8.

[34] *McKinley*, supra at 146, 764 S.E.2d at 308.

[35] *Noland*, supra at 383, 686 S.E.2d at 34.

Fourth, if the plaintiff does not benefit from the discovery rule, then the Court must look at "whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action." See *Dunn*, 689 S.E.2d at 265. Lastly, the Court must inquire whether "some other tolling doctrine" affects the statute of limitations period. See id.

In *Parsons v. Standard Insurance Co.*, the plaintiff's WVUTPA and common law bad faith claims were asserted as a result of the defendant insurance company's "denial of coverage and cessation of any further benefit payments, both of which occurred on February 13, 2014." No. 1:16CV20, 2016 WL 2599143, at *2-3 (N.D. W. Va. May 5, 2016). The plaintiff was "put on notice of the Defendants' [denial] .... when he received the February 13, 2014 letter." Id. at *2. Therefore, the Court applied the discovery rule and concluded that the cause of action accrued the day he received the letter. See id. It further held that it was "clear from the face of Parsons' complaint that he was aware of the denial of coverage and cessation of benefit payments when he received the defendants' denial letter .... The Court, therefore, conclude[d] that the statute of limitations began to run on that date." Id. at *3 (applying the one-year statute of limitations applicable to WVUTPA and common law bad faith claims).

Here, the claims' requisite elements occurred between February 9, 2007, when Ms. Wilt first applied for the insurance, and April 24, 2014, when her insurance benefits ceased. (See ECF No. 3-1 at 13, ¶ 1; 14, ¶ 12.) Defendant's representative made the alleged misrepresentation regarding the length of the insurance coverage the day she enrolled in the credit disability insurance. (See id. ¶ 7.) Plaintiff then received a letter in the mail on July 26, 2013, "stating that her benefits would terminate on April 24, 2014 ...." (Id. ¶ 12.) She claims to have learned through this letter that Household's salesperson's statements from 2007 were false. (See id.) Plaintiff filed this action in state court on November 21, 2014.

Applying the discovery rule to Plaintiff's claims under WVUTPA § 33-11-4(1)(a), (2),8 (9)(a), (11), and her first-party insurance bad faith claim, Ms. Wilt knew of the alleged WVUTPA and first-party insurance bad faith violations when she read the July 26, 2013, letter mailed to her restating that the insurance policy benefits coverage only lasted 24 months. (See ECF No. 3-1 at 2, ¶ 12.) This is very similar to the letter received by the plaintiff in *Parsons* notifying the insured that disability insurance payments would cease. There, the cause of action accrued and the statute of limitations began to run on the date he received the letter. Likewise, the one-year statute of limitations on the present claims began to run on July 26, 2013.

This Court's *Beane* memorandum decision confuses what is the measure of damages in a first-party common law bad faith claim, i.e., "Whenever a policyholder substantially prevails in a

property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in vindicating its claim; (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience" from Syllabus Point 1 of *Hayseeds*, supra, with when a first-party bad faith claim accrues, i.e., when a policyholder claim is denied.

In this matter, the pleadings clearly establish that Mr. Dolly knew of the denial of the insurance claim by Erie no later than November 4, 2013, but failed to file the Amended Complaint asserting UTPA violations and common law bad faith until March 22, 2016. In other words, Mr. Dolly filed the Amended Complaint asserting UTPA violations and common law bad faith against Erie more than one year after Mr. Dolly knew or should have known, from the declination letter provided by Erie, of his claims against Erie.

Accordingly, Mr. Dolly's UTPA claim should have been dismissed as barred by the one-year statute of limitations. Mr. Dolly's common law bad faith claim also should have been dismissed as barred by the one-year statute of limitations or, in the alternative, for failure to state a claim because a *Hayseeds* claim has not yet accrued.

In his brief, Mr. Dolly first argues that *Davis* and *Kiger* support his arguments relative to *Beane*,[36] but as noted, *Davis* was overruled in *Madden*, and *Kiger* relied solely upon *Davis*. Mr. Dolly next argues that "he failed to receive the letter" dated November 4, 2013,[37] but his original complaint filed on May 8, 2014, acknowledged that Erie has paid him for his truck, but not his

[36] Respondent's Brief at 23.

[37] Respondent's Brief at 24.

trailer or ATV;[38] in his pretrial memorandum filed on May 15, 2015, he stated, "Erie promptly reimbursed Mr. Dolly for the loss of his Ford Ranger pick-up, **but denied his claim for reimbursement relating to the trailer and ATV under . . . his uninsured motorist coverage;**"[39] and, in his motion to amend his complaint, Mr. Dolly stated, "On March 30, 2015, Erie notified Mr. Dolly's counsel that uninsured coverage existed for the truck, but not the trailer and ATV,"[40] which is more than one-year prior to the filing of Mr. Dolly's motion to

IV. CONCLUSION

WHEREFORE, Petitioner, Erie Insurance Company, respectfully requests that this Court reverse the orders of the Circuit Court of Hampshire County and remand with directions to enter judgment on either the issue of coverage or on the issue of whether the statutory and common law bad faith claims are barred by the applicable one-year statute of limitations.

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[38] [APP 10-11]

[39] [APP 43] [Emphasis supplied]

[40] [APP 59]

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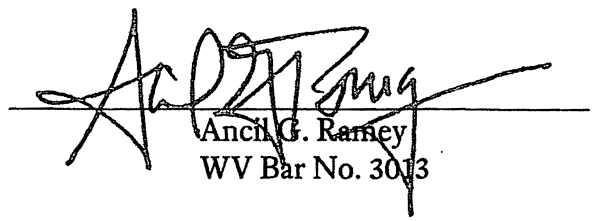
CERTIFICATE OF SERVICE

I do hereby certify that on May 19, 2017, I caused to be deposited in the United States Mail, postage prepaid, a true copy of the **REPLY BRIEF OF THE PETITIONER**, addressed as follows:

Jonathan G. Brill, Esq.
P.O. Box 932
Romney, WV 26757
Counsel for Respondent



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